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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 129

ALL AMERICAN AIRWAYS, INC., ET AL., *Petitioners*,

v.

UNITED AIR LINES, INC., ET AL., *Respondents*.

MOTION OF PETITIONERS TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

ALBERT F. BEITEL
JOHN H. PRATT
Counsel for Petitioners

905 American Security
Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners by their attorneys and respectfully move this Honorable Court to defer consideration of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein on June 6, 1960, and in support of said Motion respectfully state as follows:

I. PERTINENT STATEMENT OF THE CASE

The questions presented to this Honorable Court in the Petition for Writ of Certiorari arise as a result of a proceeding before the Civil Aeronautics Board[1] known as the *Large Irregular Air Carrier Investigation*, docket 5132, *et al.* That proceeding was instituted by the Board in September, 1951 to determine the role of a class of air carriers (now known as supplemental carriers) in the national system of air transportation. (R. 1A)[2]

In 1955, the Board issued an interim opinion which granted certain operating rights to supplemental carriers in the form of individual exemptions. (R. 573A) On review, the United States Court of Appeals for the District of Columbia Circuit reversed the interim decision of the Board for the failure to make sufficient findings to show what circumstances "would make certification an undue burden" on the supplemental carriers so as to warrant the issuance of exemptions.[3]

The Court of Appeals granted a motion concurred in by all parties, which stayed the effect of its judgment and issuance of mandate until the Board issued a final decision in the proceeding.

Thereafter, on January 28, 1959, the Board rendered a final opinion[4] which directed the issuance of cer-

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[1] Sometimes hereinafter called "the Board".

[2] "R" designates the record filed with the Petition for Certiorari.

[3] *American Airlines* v. *Civil Aeronautics Board*, 98 U.S. App. D. C. 348, 235 F. 2d 845 (1956), cert. denied 353 U.S. 905 (1957).

[4] The opinion is "final" as to issues involving interstate air transportation.

tificates of public convenience and necessity (in lieu of the previous exemptions) to the supplemental carriers. (R. 1100A) This time the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the Board on the ground that the Federal Aviation Act of 1958 [49 U.S.C. 1301 *et seq.*, Act of August 23, 1958, 72 Stat. 731] does not empower the Board to issue certificates of public convenience and necessity for supplemental air service.[5] It is this decision which petitioners pray this Court to review, by petition for writ of certiorari filed herein on June 6, 1960. Under Rule 27 of the Rules of the Court of Appeals, the mandate is stayed pending the final disposition of the case by this Court.

By order dated June 17, 1960, the Chief Justice granted the application of the Solicitor General, extending the time for filing petition for certiorari to and including September 3, 1960. The same order extends the time for filing a response to the petition for certiorari filed on June 6, 1960.

II. DEVELOPMENTS SINCE PETITION FOR CERTIORARI WAS FILED

In the meantime, after petitioners filed their petition, the Congress considered two bills which would have affected the petitioners. One would have expressly amended the Federal Aviation Act to remove any doubt of the power of the Board to act as it did. The Senate passed this bill. However, the House refused to follow the Senate action and adopted only stop-gap legislation, (H.R. 7593), which was finally passed

[5] *United Air Lines* v. *Civil Aeronautics Board*, ——— U.S. App. D.C. ———, ——— F. 2d ——— (1960), petition for certiorari filed June 6, 1960.

by the Congress as Public Law 86-661, 74 Stat. 527, and is attached to this motion as Appendix A.

The stop-gap legislation empowers the Board "to validate" for a period "not to exceed twenty months" the certificates of public convenience and necessity which it issued in this case.

III. THE STOP-GAP LEGISLATION DOES NOT RENDER THIS CASE MOOT

The legislation would enable the Board to validate the certificates for a period "not to exceed" twenty months. This merely maintains the situation, for a short time, which existed before the decision of the Court of Appeals. However, your petitioners hold certificates which by their terms will exist for five years, and the Board cannot validate these certificates in their entirety. The legislation does not enable the Board to do all that it has attempted to do in this case. Moreover, there is still pending before the Board the question of the form in which petitioners should receive authority to engage in overseas and foreign air transportation and the decision in this case will undoubtedly govern the Board's action in the part of the case still pending before the Board.

Whether the Congress will consider the matter further is not known; and, it cannot be foretold if the Congress will adopt legislation which would expressly permit the Board to issue certificates for supplemental service. Supplemental service consists of two principal kinds: charter flights without limit as to number, and individually-ticketed flights limited to ten trips per month between the same two points. During the debate on the bill in the House of Representatives, Mr. Collier stated his intention to introduce an amend-

ment to the bill which would confine the supplemental carriers to charter flights and eliminate the individually-ticketed flight authority which the Board has awarded in the certificates issued to the supplemental carriers.[6] A similar statement was made in the Senate debate.[7]

If the result of the legislation is merely to give the Board added authority to issue a certificate of public convenience and necessity for part of the service which the Board has found to be required, and no other change is made in the regulatory statute, or, if legislation is not enacted, there still will remain the issue of the Board's powers under the statute as it presently exists.

Both the Board and your petitioners believe that the Board already has all of the necessary authority to issue certificates for supplemental service and the question remains ripe for consideration by this Court.

In a similar case, this Court recognized that stopgap legislation which merely maintains the status quo does not render a case moot. In *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153 (1958) a unanimous Court held:

> "The statute accordingly operates as a legislatively ordained stay of the Secretary's order insofar as it affects the present respondents and those similarly situated. (citation omitted). In view of the very temporary nature of this legislative 'stay', the automatic resumption of the status quo upon its expiration, and the effect of the order on the respondents, even during the legislative stay, we

[6] Congressional Record—House, June 24, 1960, p. 13222.

[7] Congressional Record—Senate, June 27, 1960, p. 13432.

agree with the parties that the matter before us is not moot." (358 U.S. 168)

The Congress did not intend, by its stop-gap legislation, to affect any existing litigation. In the House debate, specific reference was made to certain pending cases in the following colloquy:

> "Mr. Daddario. Will it prevent their cases being considered in a court of law, even though they are not mentioned in this bill?
>
> "Mr. Williams. No. It does not prevent their cases being considered in a court of law.
>
> "Mr. Harris. Mr. Speaker, will the gentleman yield?
>
> "Mr. Williams. I yield to the gentleman from Arkansas.
>
> "Mr. Harris. Is it not a fact that this bill is very simple in character, and it does nothing except to provide stop-gap legislation? Everything is status quo with reference to this type of carrier for 1 year, giving the Congress an opportunity to try to work it out when we come back next session?
>
> "Mr. Williams. The gentleman has stated the case exactly."[8]

It becomes apparent that this case is not moot.

IV. EFFECT OF STOP-GAP LEGISLATION ON PETITION FOR CERTIORARI

Petitioners recognize the immediate problem of their being able to operate is alleviated by the legislation. Petitioners likewise realize that this Court may not want to consider the petition for certiorari if the Congress will deal further with the matter.

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[8] Congressional Record—House, June 24, 1960, p. 13221.

Nevertheless, the legal issues continue to be of paramount importance to the entire supplemental air carrier industry, and they are of great importance in connection with the Board's further action on the overseas and foreign-air transportation phases of the case.

If, therefore, the Court does not desire to consider the petition for certiorari at this time, petitioners suggest that the Court defer consideration of the petition for certiorari, and hold it on the docket pending further action by the Congress. In another case involving air transportation, when it appeared that a new development in a case might completely settle the issues, the Court granted certiorari but the case was held in abeyance pending further action by the Board. *W. R. Grace & Co. v. Civil Aeronautics Board*, 145 F. 2d 271, cert. granted 328 U.S. 832, dismissed as moot, 332 U.S. 827.

Here, it would seem to be appropriate to defer consideration of the petition for certiorari. "On occasion a petition for certiorari may be held, without the Court taking any action, until some event takes place which will aid or control the determination of the matter. It may be held until a decision is reached by the Court in a pending case raising identical or similar issues, or until an imminent state court decision is rendered on a controlling issue of state law, or until some anticipated event occurs which may come about on motion of a party (see Murray v. City of New York, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720) or on the Court's own motion." *Supreme Court Practice*, Stern and Gressman (2nd ed., 1954) p. 154.

Wherefore, if the Court does not wish to consider the petition for certiorari at this time, it is suggested

that it be held pending the subsequent events, or, in the alternative, that the petition be granted.

Respectfully submitted,

ALBERT F. BEITEL
JOHN H. PRATT
Counsel for Petitioners

905 American Security Building
Washington 5, D. C.

Appendix A

Public Law 86-661
86th Congress, H. R. 7393
July 14, 1960

AN ACT

To provide that the Civil Aeronautics Board may temporarily authorize certain air carriers to engage in supplemental air transportion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Civil Aeronautics Board (hereafter in this Act referred to as the "Board") is empowered—

(1) to validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

SEC. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board—

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certificate of public convenience and necessity issued pursuant to

Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, or against the holder of any operating authority conferred under Board Order E-9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the conferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E-9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point.

Approved July 14, 1960